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In the
Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL, *et al.*,
Petitioners,

v.

ANGEL MCCLARY RAICH, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE STATES OF ALABAMA, LOUISIANA, AND MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Controlled Substances Act, 21 U.S.C. §801 *et seq.*, exceeds Congress' power under the Commerce Clause as applied to the intrastate possession and manufacture of marijuana for purported personal "medicinal" use or to the distribution of marijuana without charge for such use. *See* Pet. at i.

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Jim Chen, *Filburn's Legacy*, 52 Emory L.J. 1719 (2003) 20, 23

Deborah Jones Merritt, *Commerce!*, 94 Mich. L. Rev. 674 (1995) 19, 21

Ethan A. Nadelmann, *An End to Marijuana Prohibition*, National Review (July 12, 2004) 1

Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946: Part II*, 59 Harv. L. Rev. 883 (1946) 22

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Baldwin County Sheriff's Department, Narcotics Division, www.sheriff.co.baldwin.al.us. 5

Barbour/Bullock County Drug Task Force, www.bcdtf.com 5

City of Birmingham – Police Department, Vice and Narcotics Unit, www.information.birmingham.com/police/vicenar.htm 5, 30

Huntsville Police Department – Priorities in Focus: Drugs, www.ci.huntsville.al.us/police/drugs.htm 5

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INTEREST OF AMICI

The Court should make no mistake: The States of Alabama, Louisiana, and Mississippi do *not* appear here to champion (or even to defend) the public policies underlying California's so-called "compassionate use" law. As a matter of drug-control policy, the amici States are basically with the Federal Government on this one. We agree wholeheartedly that drug abuse is one of the Nation's "most important public health problem[s]"[1] and is "undercutting traditional values and threatening the very existence of stable families, communities, and government institutions,"[2] and we are fully committed to partnering with the Federal Government in a vigorous prosecution of the war on drugs.

This, accordingly, is not a brief of "[d]rug legalization advocates"[3] or "pro-marijuana activists."[4] Far from it. With respect to the issue at hand, the amici States' Legislatures have enacted, their Attorneys General have enforced, and their courts have routinely sustained statutes broadly criminalizing marijuana possession and, depending on the circumstances, punishing violators with up to 10 years in prison for a first offense. *See, e.g.*, Ala. Code §§13A-5-6, 13A-5-7, 13A-12-213, 13A-12-214. Indeed, the lead amicus here, Alabama, has apparently earned something of a reputation for its zeal in prosecuting and punishing drug crimes. *See* E. Nadelmann, *An End to Marijuana Prohibition*, National Review, p.28 (July 12, 2004) ("Alabama currently locks up people convicted three times of marijuana possession for 15 years to life."). It is not a reputation of which Alabama is embarrassed or ashamed. On the contrary, Alabama's Attorney General has every intention of continuing to prosecute drug crimes to the fullest extent of the law.

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[1] Br. of U.S. Representatives as Amici Curiae at 3 ("Reps' Br.").
[2] Br. of the Drug Free America Found., *et al.*, as Amici Curiae at 1 ("Drug Free Br.").
[3] Drug Free Br. 9.
[4] Reps' Br. 15.

Drug-control policy aside, the amici States also disagree with respondents' contention that there is embedded in the Constitution (whether in the Due Process Clause, the Ninth Amendment, or elsewhere) a "fundamental right" – however defined – to smoke or otherwise ingest marijuana. Alabama, for instance, has consistently urged this Court not to divine new, unenumerated rights from the Constitution's open-textured provisions and, instead, to leave difficult social policy choices to elected state legislatures. *See, e.g.*, Br. of the States of Alabama, *et al.*, *Roper v. Simmons*, No. 03-633; Br. for the States of Alabama, *et al.*, as Amici Curiae, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Br. for Amici Curiae States of California, Alabama, *et al.*, *Washington v. Glucksburg*, 521 U.S. 702 (1997) (No. 96-110). The amici States' position here is no different.

From the amici States' perspective, however, this is not a case about drug-control policy or fundamental rights. This is a case about "our federalism," which "requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999). The Government apparently does not view the federalism issue in this case as a serious one. *See* U.S. Br. 13 ("*It is clear* that Congress has the authority ...." (emphasis added)). We respectfully disagree. And, just as individual States have intervened to challenge laudatory (and popular) congressional statutes on federalism grounds before, *see, e.g.*, Br. for the State of Alabama as Amicus Curiae, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), the amici States perceive a need to do so here.

While the amici States may not see eye to eye with some of their neighbors concerning the wisdom of decriminalizing marijuana possession and use in certain instances,[5] they support their neighbors' prerogative in

[5] The State of Louisiana, which has enacted a statute permitting the medicinal use of marijuana in very limited circumstances, joins in the Argument section of this brief.

our federalist system to serve as "laboratories for experimentation." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). As Justice Brandeis famously remarked, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Whether California and the other compassionate-use States are "courageous" – or instead profoundly misguided – is not the point. The point is that, as a sovereign member of the federal union, California is entitled to make for itself the tough policy choices that affect its citizens. By stepping in here, under the guise of regulating interstate commerce, to stymie California's "experiment[]," Congress crossed the constitutional line.

ALABAMA'S DRUG-CONTROL REGIME

All of the amici States have adopted – and vigorously enforce – broad prohibitions on marijuana possession and use. *See generally* Appendix, *infra*. The States' precise prohibitions and enforcement strategies, of course, are not identical in every jot and tittle. The following description of Alabama's drug-control regime, however, is illustrative of the way in which the amici States have tackled the marijuana-possession problem.

A. Alabama's Criminal Statutes

In a portion of the criminal code devoted to "Offenses Against Public Health and Morals," Alabama law comprehensively prohibits the cultivation, possession, sale, distribution, and trafficking of marijuana. *See* Ala. Code §13A-12-210 *et seq*. Under Alabama law, as under the U.S. Code, marijuana is a "Schedule I" drug, meaning it has a "high potential for abuse" and has "no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical

supervision," *id.* §§20-2-22, 20-2-23 (referenced in *id.* §13A-12-216).

As relevant here, a person is guilty under Alabama law of "Unlawful possession of marihuana in the second degree," a Class A misdemeanor punishable by up to a year in prison, if he possesses marijuana for personal use. *Id.* §§13A-12-214, 13A-5-7. A person commits the crime of "Unlawful possession of marihuana in the first degree," a Class C felony punishable by up to 10 years in prison, if he (i) possesses marijuana for other than personal use or (ii) possesses marijuana for personal use after having been previously convicted of personal-use possession. *Id.* §§13A-12-213, 13A-5-6. Additionally, a person is guilty of the "Unlawful distribution of controlled substances," a Class B felony punishable by up to 20 years in prison, if he "sells, furnishes, gives away, manufactures, delivers, or distributes [any] controlled substance," including marijuana. *Id.* §§13A-12-211, 13A-5-6. At the Attorney General's urging, Alabama courts have broadly construed these statutes – for instance, to allow for conviction on a theory of "constructive possession." *See, e.g., Gray v. State*, 600 So. 2d 1076, 1078 (Ala. Crim. App. 1992).

Respondents' conduct – cultivating and possessing marijuana for personal consumption – would thus plainly be criminal in the State of Alabama. Notably for present purposes, Alabama courts have – again, at the Attorney General's urging – expressly refused to recognize "'medical necessity' as a valid defense in a prosecution for the unlawful possession of marijuana." *Kauffman v. State*, 620 So. 2d 90, 93 (Ala. Crim. App. 1992). The defendant in *Kauffman* alleged that he suffered from "uncontrollable muscle spasms and associated crippling symptoms of an affliction that [was] progressing from paraplegia to quadriplegia" and that "marijuana [was] the only medication that w[ould] relieve his pain and suffering." *Id.* at 91. Despite the sympathy that the defendant's condition unquestionably engendered, the court, after canvassing the relevant statutes and common-law precedents, held that "the Alabama Legislature ha[d]

precluded the appellant's use of the defense of medical necessity ...." *Id.* at 92.[6]

B. Alabama's Law-Enforcement Efforts

In the war on drugs, Alabama is not standing pat. To the contrary, both state and local law-enforcement agencies in Alabama have devoted substantial resources to the investigation and prosecution of narcotics offenses. At the state level, Alabama's Department of Public Safety includes two units – the Alabama Bureau of Investigation and the Highway Patrol Division – that target drug crime. *See* Alabama Department of Public Safety, www.dps.state.al.us. At the local level, many police and sheriffs' departments in Alabama operate dedicated narcotics units. *See, e.g.*, City of Birmingham – Police Department, Vice and Narcotics Unit, www.information.birmingham.com/police/vicenar.htm ("Birmingham PD Report"); Huntsville Police Department – Priorities in Focus: Drugs, www.ci.huntsville.al.us/police/drugs.htm; Baldwin County Sheriff's Department, Narcotics Division, www.sheriff.co.baldwin.al.us. Other local jurisdictions have banded together to form joint task forces to combat drug crime more efficiently. *See, e.g.*, Madison-Morgan County Strategic Counterdrug Team, www.drugteam.net; Barbour/Bullock County Drug Task Force, www.bcdtf.com; West Alabama Narcotics Task Force, www.ci.tuscaloosa.al.us/pdinfo.htm.

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[6] Interestingly enough, Alabama has dealt with the issue of medical marijuana before. In 1979, the Alabama Legislature enacted the Controlled Substances Therapeutic Research Act. *See* Acts 1979, No. 79-472, p.870 (codified at Ala. Code §20-2-110 *et seq.*). That Act established within the state Board of Medical Examiners a research program, pursuant to which an "authorized practitioner" could "certif[y]" a chemotherapy or glaucoma patient for strictly supervised cannabis-based treatment. Ala. Code §20-2-114. The research program, however, never really got off the ground and, although it technically remains on the books, is by all accounts defunct today. We are informed by the Board of Medical Examiners that there are no patients presently participating in the program and, indeed, that the program's cannabis-prescription apparatus is non-existent and that no practitioner is currently certified by the Board to dispense cannabis.

Not surprisingly, these vigorous enforcement efforts have paid dividends – particularly (as relevant here) on the marijuana-possession front. During 2003 alone, state and local law-enforcement officers arrested 16,524 persons for drug-related offenses. That is more than the number of persons arrested for DUI (14,173) and larceny (15,935) – and, indeed, is more than the number of persons arrested for homicide, rape, assault, burglary, robbery, arson, and car theft *combined*. Notably for present purposes, "marijuana possession resulted in the greatest number of arrests for drug violations"; there were 9469 marijuana-possession arrests in 2003, a figure that represents 57% of all drug-related arrests. *See* 2003 Crime in Alabama, Alabama Criminal Justice Information Center, www.acjic.state.al.us/sac.[7] Statistics for each of the previous eight years are to the same effect:

Year	Drug Arrests	Marijuana. Poss. Arrests
2002	15,493	9105 (59%)
2001	14,295	8953 (63%)
2000	14,890	9658 (65%)
1999	16,492	10,566 (64%)
1998	17,516	10,573 (60%)
1997	16.345	10,008 (61%)
1996	15,580	8981 (58%)
1995	13,201	7723 (59%)

See Statistical Analysis Center, Alabama Criminal Justice Information Center, www.acjic.state.al.us/sac.

What these data show is that Alabama's focus on drug crime generally, and on marijuana possession specifically, is no passing fancy. To the contrary, Alabama's campaign has been, and will continue to be, sustained and vigilant.

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[7] In addition, between July 2003 and July 2004, Alabama Highway Patrol officers made 482 marijuana-possession arrests. *See* Alabama Department of Public Safety, AST Violation Tally Ticket Summary.

SUMMARY OF ARGUMENT

The question presented here is not whether vigorous enforcement of the Nation's drug laws is good criminal policy. It most assuredly is. The question, rather, is whether the Constitution permits the Federal Government, under the guise of regulating interstate commerce, to criminalize the purely local possession of marijuana for personal medicinal use. It does not.

1. A straightforward application of the principles outlined in *Lopez* and *Morrison* shows that Congress crossed the constitutional line when it criminalized the purely local possession of marijuana for personal use. First, like gun possession, marijuana possession is not inherently an "economic activity." Second, the Controlled Substances Act provision at issue lacks a jurisdictional hook; it purports to regulate local possession per se, without respect to any connection to interstate commerce. Third, although Congress made several generic findings in the text of the CSA concerning the interstate effects of local drug activity (*e.g.*, that drugs possessed locally "commonly flow through interstate commerce"), those findings are not entitled to deference here both (i) because they are unsupported by any hard data in the legislative record and (ii) because they do not address marijuana that, like respondents', is produced intrastate, possessed intrastate, and consumed intrastate.

2. *Wickard v. Filburn* is not the panacea the Government thinks, for three reasons. First, *Lopez* and *Morrison* make clear that *Wickard*'s aggregation principle does not apply where, as here, the activity subject to federal regulation is not "economic." Second, and in any event, it is just not true that *Wickard* is on all fours here. Contrary to popular misconception, *Wickard* was not about a farmer growing wheat in his back yard to bake a few loaves of bread. Farmer Filburn owned a large and multifaceted farming operation; during the year in question, he harvested nearly 28,000 pounds of wheat. Moreover, careful attention to the economic and agricultural facts underlying *Wickard* shows that the

"home consumption" to which the Court in that case referred was, at least principally, Filburn's use of large quantities of wheat to feed livestock and poultry, which he then sold on the open market. Had *Wickard* really been just about Filburn's bread-baking, it is inconceivable to us that it would have come out the same way. Because the Government here seeks to apply the CSA's criminal prohibitions to respondents' simple possession of a few marijuana plants, its theory would carry the Court well beyond *Wickard* and into uncharted Commerce-Clause waters. Finally, to the extent that *Wickard* can be read to justify direct federal regulation of respondents' purely local possession, it should be overruled.

3. The Government's "frustration of purpose" argument – that without authority over local activity Congress cannot efficiently regulate interstate drug trafficking – likewise fails for several reasons. First, it is not (and does not purport to be) a *constitutional* argument; the fact that direct control over local activity may facilitate congressional objectives has little, if anything, to do with the anterior question whether Congress has constitutional authority to exert direct control. Second, the Government has offered no evidence – statistical, anecdotal, or otherwise – to support its assertion that direct control over local activity is "essential" to federal drug policy. Finally – and most importantly from the States' perspective – the Government's various arguments about the imperative of effective drug-control policy *completely ignore the ongoing efforts of state and local law enforcement.* The Government's assertion of federal power here seems rather plainly to rest on the assumption that absent federal control, anarchy would reign at the local level. That assumption is (to say the least) unwarranted.

ARGUMENT

This case presents the question the Court reserved in *United States v. Oakland Cannabis Buyers' Cooperative* – namely, whether, as applied to what all here agree is the purely local cultivation and possession of marijuana for personal, noncommercial use, the Controlled Substances Act ("CSA") "exceeds Congress' power under the Commerce Clause." 532 U.S. 483, 495 n.7 (2001). The question is a narrow one: whatever the outcome here, the amici States agree that Congress enjoys wide latitude in regulating the "quintessentially commercial" aspects of the drug trade (*e.g.*, manufacture and distribution for consideration). U.S. Br. 18. The issue here is simply whether Congress' effort to extend its power under the "interstate" Commerce Clause to conduct that is *neither* interstate *nor* commerce is a bridge too far. *Cf. National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1061 (D.C. Cir. 1997) (Sentelle, J., dissenting) (comparing extension of interstate-commerce power to conduct that is neither interstate nor commerce to "the old chestnut: If we had some ham, we could fix some ham and eggs, if we had some eggs").

The resolution of the question presented turns on the "first principles" of our federal system. *United States v. Lopez*, 514 U.S. 549, 552 (1995). First, whereas the powers that are reserved to the States under the Constitution are "numerous and indefinite," those delegated to the Federal Government are "few and defined." *The Federalist* No. 45, at 292-93 (C. Rossiter ed., 1961). Second, it is so that the limitations on federal power "may not be mistaken or forgotten [that] the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 176 (1803). And third, "courts of justice" must be "bulwarks of a limited Constitution against legislative encroachments" and invalidate enactments that go too far. *The Federalist* No. 78, at 469. However sound as a matter of policy, the laws at issue – which, among other things, make "simple drug possession" (U.S. Br. 11) a federal criminal offense – go too far.

This case arises against the backdrop of the States' unquestioned "police power" to make and enforce laws protecting the health, safety, welfare, and morals of their citizens. Indeed, of the "numerous" powers reserved to the States under the Constitution, one of the most fundamental is the power to define and punish criminal conduct. This Court has recently reiterated that "[u]nder our federal system, the '"States possess primary authority for defining and enforcing the criminal law,"'" *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982))), and, further, that "criminal law enforcement" is an area "where States historically have been sovereign," *id.* at 564; *see also id.* at 580 (Kennedy, J., concurring) (criminal law an "area of traditional state concern"). It has long been recognized, by contrast, that Congress has no power to "punish felonies generally," *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821), and does not enjoy anything approaching a general police power over citizens' health and safety, *see United States v. Morrison*, 529 U.S. 598, 618-19 & n.8 (2000).

This case illustrates precisely how an overreaching federal criminal statute – again, however well-intentioned – can undermine state prerogatives. Many States, the amici States among them, already outlaw marijuana possession in essentially all circumstances. *See supra* at 3-5 (Alabama); *see also* La. Rev. Stat. Ann. 40:966(C); Miss. Code Ann. §41-29-139(c). This Court has recognized that where, as here, Congress "criminalizes conduct already denounced as criminal by the States, it effects a '"change in the sensitive relation between federal and state criminal jurisdiction."'" *Lopez*, 514 U.S. at 561 n.3 (quoting *United States v. Enmons*, 410 U.S. 396, 411-12 (1973) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))); *see also Jones v. United States*, 529 U.S. 848, 859-60 (2000) (Stevens, J., concurring) (noting federal arson statute's "overlap with state authority"). Following Justice Kennedy's logic in *Lopez*, where "over 40 States already ha[d] criminal laws outlawing the possession of

firearms on or near school grounds," if a State determines (as many have) "that harsh criminal sanctions are necessary and wise to deter" marijuana possession, "the reserved powers of the States are sufficient to enact those measures." 514 U.S. at 581 (Kennedy, J., concurring).

Just as the CSA unnecessarily duplicates the criminal regimes of many States, it "effectively displaces" the "policy choice[s]" made by others. *Jones*, 529 U.S. at 859 (Stevens, J., concurring). In striking down the Gun Free School Zones Act in *Lopez*, this Court emphasized the Government's concession that the Act "'displace[d] state policy choices in ... that its prohibitions appl[ied] even in States that ha[d] chosen not to outlaw the conduct in question.'" 514 U.S. at 561 n.3 (quoting Br. for United States 29 n.18). So, too, the CSA countermands state policy choices and substitutes a uniform federal rule. Several States – California among them – have chosen to enact medical-use exceptions to their general marijuana-possession prohibitions. Again, the point is not whether a medical-use exception is sound criminal policy (the amici States are convinced it is not). Rather, the point is that, in our federalist system, a State has the right to set its own criminal policy free of congressional interference.

I. A Straightforward Application Of *Lopez* And *Morrison* Demonstrates That The CSA May Not Be Applied To Purely Local Activity.

In its recent Commerce-Clause decisions, this Court has enumerated guideposts for determining whether an activity sufficiently "substantially affects" interstate commerce to permit congressional regulation. *See Morrison*, 529 U.S. at 610-13. Those guideposts – which, notably, the Government's brief does not analyze in any systematic way – point decisively toward a finding of unconstitutionality here.

1. *Economic Activity.* This Court has emphasized that in every instance in which it has permitted federal regulation of local activity on the ground that it substantially affects interstate commerce, "the activity in

question has been some sort of economic endeavor." *Id.* at 611. As examples, the Court in *Lopez* pointed to decisions allowing federal regulation of, for instance, coal mining, credit transactions, restaurants, and hotels. 514 U.S. at 560. By contrast, the statute the Court faced in *Lopez*, which criminalized the possession of guns in school zones, "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. "The possession of a gun in a local school zone," the Court emphasized, "is in no sense an economic activity" that might affect interstate commerce. *Id.* at 567. Even *Wickard v. Filburn*, 317 U.S. 111 (1942) – of which more later – "involved economic activity in a way that the possession of a gun in a school zone does not." 514 U.S. at 560. *Morrison* is to the same effect. In striking down a portion of the Violence Against Women Act, this Court there emphasized that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 529 U.S. at 613.

What was true in *Lopez* and *Morrison* is equally true here. The activity that Congress seeks to regulate – the purely local cultivation, possession, and personal use of marijuana – is "beyond the realm of commerce in the ordinary and usual sense of that term." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); *see also id.* at 599 (Thomas, J., concurring) ("wholly separated from business"). To be sure, there is a vibrant interstate market in illegal drugs; it would be naïve to pretend otherwise. *See, e.g.*, U.S. Br. 19 ("The interstate market for marijuana that Congress regulates under the CSA is well-established and substantial."). But that was the case in *Lopez*, as well; surely the interstate gun market is no less robust than the interstate drug market. And just as the firearms statute at issue in *Lopez* was aimed not at the commercial aspect of the gun "market," but instead at protecting the welfare of schoolchildren, the CSA is not intended (at least primarily) to strike at the commercial aspect of the drug trade, but instead to minimize the harmful effects that accompany drug use. *Cf. United*

States v. Stewart, 348 F.3d 1132, 1137 (9th Cir. 2003) (Kozinski, J.) (federal machine-gun ban intended to keep guns out of the hands of criminals, not to regulate the economics of the "machinegun business").

The Government contends that respondents' conduct here is "economic activity that is subject to congressional control because it occurs in, and substantially affects, the marijuana market generally." U.S. Br. 12. But that argument blurs together two distinct requirements of valid Commerce-Clause legislation. To be the proper subject of federal regulation, a local activity must both (i) be "economic" in its own right and (ii) "substantially affect[]" interstate commerce. *See Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."). By arguing that respondents' conduct is economic *because* it affects interstate commerce, the Government elides the economic-activity limitation that this Court's cases plainly establish.

The Government's argument, in any event, cannot overcome the basic point here that, as in both *Lopez* and *Morrison*, "[n]either the actors nor their conduct" – nor, for that matter, the purpose underlying the challenged statute – "has a commercial character ...." *Lopez*, 514 U.S. at 581. Respondents here are not trafficking in marijuana; nor do they pay for the marijuana they use. Rather, respondents cultivate and possess small amounts – infinitesimal, in the grand scheme – of marijuana purely for personal use. *See* Pet. App. 6a (six cannabis plants). Respondents' "simple drug possession" (U.S. Br. 11) may well be condemnable; what it is *not* is economic or commercial in any meaningful sense. *See Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) ("simple possession of a gun"); *id.* at 585 (Thomas, J., concurring) ("mere gun possession").

Under this Court's precedent, the fact that Congress here has purported to regulate "noneconomic, criminal" conduct is a "central," if not altogether sufficient, reason

for invalidating the CSA's application to respondents' purely local activities. *Morrison*, 529 U.S. at 610.

2. *Jurisdictional Element.* A second guidepost is easily discerned, and likewise points toward invalidity. The CSA makes it a federal crime "to manufacture, distribute, [or] dispense," or even "to possess," a controlled substance except as expressly authorized by the CSA itself. 21 U.S.C. §841(a), 844(a). Like the statutes struck down in *Lopez* and *Morrison* – and unlike the statute upheld in *United States v. Bass*, 404 U.S. 336 (1971) – the CSA contains "no express jurisdictional element which might limit its reach to a discrete set" of offenses "that additionally have an explicit connection to or effect on interstate commerce." *Lopez*, 514 U.S. at 562. Rather, it regulates, for instance, local cultivation and possession per se, without respect to any connection to commerce. *Cf. Bass*, 404 U.S. at 339 n.4 (recognizing constitutional question whether Congress may criminalize "mere possession"); *United States v. Five Gambling Devices*, 346 U.S. 441, 448 (1953) (plurality opinion) (same).

3. *Congressional Findings.* There is no disputing that Congress made certain findings in the body of the CSA concerning the interstate effects of intrastate drug activity. *See* U.S. Br. 4-5 (quoting 21 U.S.C. §801). For three reasons, however, Congress' findings provide an insufficient basis to sustain the CSA's application here. First, as the State of Alabama urged and as this Court held in *Morrison*, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." 529 U.S. at 614. "'"Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."'" *Id.* (quoting *Lopez*, 514 U.S. at 557 n.2 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment))). In our system of checks and balances, Congress is not "the constitutional judge[] of [its] own powers" and cannot render constructions of laws "conclusive upon the other

departments." *The Federalist* No. 78, at 467. It remains this Court's responsibility "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Second, the Court should be, if anything, more reluctant here than in *Morrison* to defer to congressional findings. In that case, Congress' findings concerning the interstate effects of gender-based violence were by Alabama's own admission "extensive"[8]; by the Court's estimation "numerous," 529 U.S. at 614; and in Justice Souter's view supported by a "mountain of data," *id.* at 628 (Souter, J., dissenting). Specifically, as Justice Souter emphasized –

- passage of the Violence Against Women Act "was preceded by four years of hearings, which included testimony from physicians and law professors; from survivors of rape and domestic violence; and from representatives of state law enforcement and private business";
- the record there "include[d] reports on gender bias from task forces in 21 States"; and
- the Court there had "the benefit of specific factual findings in the eight separate Reports issued by Congress and its committees over the long course leading to enactment."

Id. at 628-31. Even so – and in our view rightly so – the Court in *Morrison* refused to defer to Congress' findings. The same reluctance should follow *a fortiori* here, where there seems to be nothing approaching a "mountain of data" justifying direct federal control of local activity. While there is apparently an extensive legislative record on the scope of the drug problem generally (U.S. Br. 18-20), that is not the issue here. The Government has pointed to nothing in the legislative history of the CSA that goes beyond rote recitation of the findings contained in §801 to provide a reasoned evidentiary basis for direct

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[8] *See* Br. for the State of Alabama at 15.

federal control of local conduct. *See, e.g.*, U.S. Br. 2, 3, 17, 18, 19, 23, 29, 34, 39-40.

Finally, and in any event, the findings on which the Government relies are insufficient to justify application of the CSA in this case. Some simply do not apply at all. For instance, while it may be true that "after manufacture, *many* controlled substances are transported in interstate commerce," that "controlled substances distributed locally *usually* have been transported in interstate commerce immediately before their distribution," and that "controlled substances possessed *commonly* flow through interstate commerce immediately prior to such possession," 21 U.S.C. §801(3)(A)-(C) (emphasis added), none of those things, apparently, is true of the marijuana at issue here. By contrast, the record in this case shows that respondents' marijuana is produced intrastate, possessed intrastate, and consumed intrastate. *See* Br. in Opp. 6-7 ("Angel Raich's cannabis is grown using only soil, water, nutrients, growing equipment, supplies, and lumber originating from or manufactured within California. ... Diane Monson's 'cultivation of marijuana is similarly local in nature.'" (quoting Pet. App. 47a)).

Other findings seem rather plainly at odds with the core theory of the Government's case. For instance, Congress found that local possession of controlled substances would have a tendency to "swell[] the interstate traffic" in those substances. 21 U.S.C. §801(4). And, in fairness, at times the Government contends that local use and possession will "increase[] demand" for marijuana. U.S. Br. 24. But fundamentally, it seems, the Government relies on *Wickard v. Filburn*, 317 U.S. at 127, for the proposition that by cultivating and consuming one's own product (wheat there, marijuana here) an individual "forestall[s] resort to" – and thus *reduces* demand in – the interstate market. *See* U.S. Br. 38-39.

In sum, the *Lopez* and *Morrison* factors counsel strongly against the Government's position here.

II. *Wickard v. Filburn* Does Not Justify The CSA's Application To Purely Local Activity.

Rather than seeking to defend the application of the CSA under the factors enunciated in *Lopez* and *Morrison*, the Government pins its hopes principally on *Wickard v. Filburn*, 317 U.S. 111, which this Court has called "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560. The Government leads off its argument with a citation to *Wickard* (U.S. Br. 10); describes *Wickard* as a case about the production of wheat "for personal use" (U.S. Br. 16); and, accordingly, contends that the constitutionality of the CSA's application to purely personal possession and use "follows from" *Wickard* (U.S. Br. 21).

Specifically, the Government seeks the benefit of *Wickard*'s "aggregation" principle. In *Wickard*, this Court sustained federal legislation regulating wheat, including wheat "consumed on the farm," on the ground that by "meet[ing] his own needs" a wheat farmer could "forestall resort to" – and thus reduce demand in – the interstate wheat market. 317 U.S. at 127. In so doing, the Court noted that the fact that a single farmer's "own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, *taken together with that of many others similarly situated*, is far from trivial." *Id.* at 127-28 (emphasis added).

The Government's reliance on *Wickard* is misplaced for three reasons.

A. *Wickard*'s Aggregation Principle Does Not Apply Where, As Here, The Activity Subject To Federal Regulation Is Not "Economic."

In both *Lopez* and *Morrison*, this Court expressly refused to employ *Wickard*'s aggregation principle to validate congressional efforts to regulate intrastate, noneconomic activity. *See Morrison*, 529 U.S. at 611, 613;

Lopez, 514 U.S. at 560-61. And indeed, the Court in *Morrison* emphasized that "in every case where we have sustained federal regulation under the aggregation principle of *Wickard*" – including, by definition, *Wickard* itself – "the regulated activity was of an apparent commercial character." 529 U.S. at 611 n.4. Accordingly, in concluding its Commerce-Clause analysis in *Morrison*, this Court expressly "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based on that conduct's aggregate effect on interstate commerce." *Id.* at 617.

That statement controls this case, and precludes the Government's reliance on *Wickard*'s rule of aggregation. (There is certainly no principled reason why the rule allowing aggregation should be any more available with respect to noneconomic, nonviolent crime than with respect to noneconomic, violent crime. It was not the *violent* nature, but rather the *noneconomic* nature, of gender-based violence that scotched the aggregation principle in *Morrison*.) Because wholly intrastate drug possession is no more "economic" or "commercial" than wholly intrastate gun possession, the constitutionality of the CSA's application here must rise or fall here on the existence of a substantial connection between *respondents' own conduct* and interstate commerce. Because the record demonstrates (and we do not take the Government to dispute) that there is none, the Act may not validly be applied to respondents' activities.

B. Even If *Wickard* Were Applicable, It Would Not Justify Application Of The CSA To Respondents' Purely Local Activities.

Even if the aggregation principle were not categorically out of bounds here, *Wickard* – heretofore the high-water mark of Congress' Commerce-Clause authority – would not justify federal regulation of respondents' purely intrastate, personal possession and use of marijuana. Despite superficial similarities, this case is not a *Wickard* redux. The Government's description of

Wickard as a case about a lone farmer's "home-grown production of wheat" (U.S. Br. 37) for his own "personal use" (U.S. Br. 16) is, with respect, an oversimplification. It is just not true that it is "impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce in" *Wickard*. U.S. Br. 8 (quoting Pet. App. 26a). Understanding why not – and, correlatively, why the Government's argument would carry the Court well beyond *Wickard* and into uncharted Commerce-Clause waters – requires a fuller understanding of the economic and agricultural facts underlying *Wickard* than the Government's brief provides.

As noted, the aggregation principle, as announced in *Wickard* and as reiterated in subsequent cases, permits a reviewing court to consider the effect on interstate commerce of an individual litigant's conduct "taken together with that of many others similarly situated." *Wickard*, 317 U.S. at 127-28. Accordingly, the first order of business in understanding aggregation is discerning what, exactly, Roscoe Filburn was doing on his farm such that his conduct, when "taken together with that of many others similarly situated" to him, would substantially affect interstate commerce.

He was *not* just baking bread. There is a persistent myth – to which the Government's brief seems to subscribe – that *Wickard* stands for the proposition that "wheat a farmer bakes into bread and eats at home is part of 'interstate commerce'" subject to congressional regulation. *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). The myth is just that: a myth – an urban (or rural, as the case may be) legend. As one scholar has noted, "Farmer Filburn was not an organic home baker who had decided to raise wheat for a few loaves of bread"; rather, he "raised wheat commercially and regularly sold a portion" of his crop on the open market. Deborah Jones Merritt, *Commerce!*, 94 Mich. L. Rev. 674, 748-49 (1995). Indeed, the math shows

that "[t]o consume the 239 excess bushels at issue in the July 1941 wheat harvest, the Filburns would have had to consume nearly forty-four one-pound loaves of bread each day for the following year." Jim Chen, *Filburn's Legacy*, 52 Emory L.J. 1719, 1759 (2003).

Far from organic home baker, Roscoe Filburn owned and operated a large and multifaceted farming operation. As to scope, this Court's opinion reflects that Filburn's annual "wheat acreage allotment" under the Agricultural Adjustment Act ("AAA") was 11.1 acres, at a normal yield of 20.1 bushels of wheat per acre, for a total of more than 223 bushels. 317 U.S. at 114. Filburn planted an additional 11.9 acres and harvested an additional 239 bushels, bringing his total harvest to 462 bushels (or 27,720 pounds) of wheat. *Id.* Notably, the marketing quota at issue in *Wickard* applied only to large farms; it expressly exempted "any farm on which the normal production of the acreage planted to wheat was less than 200 bushels." *Id.* at 130 n.30. Plainly, then, Filburn was no small player. Had he been the organic baker of legend, his case never would have arisen; Congress had not even attempted to extend its regulatory reach to activities so local in character.

With respect to the nature of Mr. Filburn's operation, this Court's opinion in *Wickard* recites that Filburn disposed of his wheat crop in four different ways: (i) he sold some at market; (ii) he fed part to "poultry and livestock on the farm, some which [was then] sold"; (iii) he used some to make flour for bread for his family; and (iv) he kept some for seeding the following year's crop. *Id.* at 114. The question in *Wickard* was whether the Commerce Clause authorized the Federal Government to regulate the portion of Mr. Filburn's wheat yield used "for consumption on the farm." *Id.* at 118.

But, again, to be clear, the case was not principally about the wheat Mr. Filburn used to feed his family; were that the only use that Filburn had made of his wheat, his farm would have fallen outside the AAA's ambit entirely. Thus, the term "home consumption," as used in *Wickard*

(and as repeated by the Government here, *see* U.S. Br. 15), "does not refer primarily to bread and pies baked by wheat growers." Merritt, *supra*, at 749. "Instead, most farm consumption of wheat [was] devoted to feeding livestock who [were] then sold commercially and to reseeding fields to produce more wheat for commercial sale." *Id.* The statistics that the Government reported to this Court in *Wickard* tell the story. For the years 1931-1936, average U.S. wheat production was 680,603,000 bushels. The average distribution of the wheat produced in those years was as follows:

Sold on the market	484,673,000 bushels (71.2%)
Fed to livestock on the farm	107,608,000 bushels (15.8%)
Used as seed on the farm	72,567,000 bushels (10.7%)
Used in the household	15,755,000 bushels (2.3%)

See Br. for Appellants at 12, *in* 39 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 677, 692 (P. Kurland & G. Casper eds., 1975). According to another estimate based on government calculations, "[i]n Filburn's time, farmers fed twenty times more wheat to livestock than they ground into flour for home use." Chen, *supra*, at 1759 (citing U.S. Dep't of Agric., Field and Seed Crops by States, 1949-54, at 8 (1957) (Stat. Bull. No. 208)). In any event, the basic point, as summarized by the Government in its brief in *Wickard*, was that "a substantial quantity of wheat [was] consumed on the farm as feed for livestock, as seed, *and, to a slight extent, as food.*" Br. for Appellants at 41, *in Landmark Briefs*, *supra*, at 721 (emphasis added).

In addition to sheer "volume," Congress and the *Wickard* Court were concerned about "variability" in the wheat market. 317 U.S. at 128. Specifically, the Court emphasized that the "effect of consumption of homegrown wheat on interstate commerce is due to the fact that it

constitutes the most variable factor in the disappearance of the wheat crop." *Id.* at 127. But while overall "[c]onsumption on the farm where grown appear[ed] to vary in an amount greater than 20 per cent of average production," the Court noted that the "total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant." *Id.* Implicit in the Court's summary is the fact that the variability in home-consumed wheat resulted primarily from a single source: the on-farm use of wheat as feed for poultry and livestock. The Government's brief to the Court made the point explicit: While the "human consumption" of wheat was "subject to less variation than that of most commodities" and the amount of wheat "used for seed [was] also fairly constant," the amount "used for livestock feed fluctuate[d] widely with changes in livestock prices and in the relation between the prices of alternative feeds and the price of wheat." Br. for Appellant at 15, *in Landmark Briefs, supra*, at 695. Statistics confirm the Government's point. During the years preceding the AAA amendment at issue in *Wickard*, on-farm uses of wheat had varied as follows:

Fed to livestock on the farm	28-174 million bushels (521% variation)
Used as seed on the farm	73-97 million bushels (33% variation)
Used in the household	10-16 million bushels (6% variation)

Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946: Part II*, 59 Harv. L. Rev. 883, 902 (1946); *accord* Br. for Appellants at 12-13, *in Landmark Briefs, supra*, at 692-93.

Accordingly, when, following the Government's lead, the *Wickard* Court emphasized that it could "hardly be denied" that a factor of such "volume and variability" as "home-consumed wheat" would have a substantial

influence on interstate market conditions, 317 U.S. at 129, the home consumption with which it was principally concerned was the use of wheat as feed for poultry and livestock – which, of course, farmers would then turn around and sell at market. As a result of wheat farmers' decisions "to keep the crop for on-farm use as animal feed," a sizeable "portion of the wheat crop was [being] converted into meat, poultry, milk, or eggs." Chen, *supra*, at 1758. This practice of "[t]ransforming a field crop into grocery staples require[d] nothing more mysterious than the feeding of farm animals," whose products could then be sold – free of regulations on wheat – on the open market. *Id.* at 1760. "By converting excess wheat into milk, meat, poultry, and eggs, the Filburn farm engaged in a time-honored practice of regulated firms: manipulating investments between a regulated line of business (wheat) and nonregulated lines (meat, dairy, poultry, and eggs)." *Id.* Congress' fundamental purpose in extending the AAA beyond wheat actually sold at market to reach all wheat produced on farms was to prevent farmers from defeating wheat-marketing quotas "by redirecting wheat to the feeding bin." *Id.* at 1758.

Why is all of this important? For two reasons. First, because, as noted above, *Wickard*'s aggregation principle requires a precise understanding of an individual litigant's conduct – specifically, for the purpose of determining the class of persons who are "similarly situated" to him, 317 U.S. at 127-28, and whose conduct, therefore, may properly be aggregated in assessing interstate effects. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 173 (2001) (court must "evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce"). And second, because *Wickard* is "the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S. at 560, and because a comparison of that case with this shows that the Government is now asking this Court to take a quantum leap beyond *Wickard*.

Roscoe Filburn was *not*, as legend would have it, a simple farmer raising wheat to feed his family; rather, like other wheat farmers of his day, Filburn sold the great majority of his wheat commercially, either directly (on the open wheat market) or indirectly (for instance, in the form of wheat-fed livestock and poultry). Without conceding the initial correctness of *Wickard*, it is easy to see that, when "taken together," all of the Nation's Roscoe Filburns – *i.e.*, farmers who, like Filburn himself, used their acreage primarily for market purposes – likely generated a substantial effect on interstate commerce. Respondents here (and, importantly for aggregation purposes, those "similarly situated" to them) are in a very different boat: "They do not sell, barter, or exchange cannabis, or use it to produce any other product that they sell, barter, or exchange." Br. in Opp. 15. Put simply, *respondents are not market actors*. Respondents' simple possession of marijuana for personal use is akin to Roscoe Filburn's use – considered in isolation – of wheat to bake bread to feed his family. Had *Wickard* really been just about Filburn's bread-baking, it is inconceivable to us that the case would have come out the same way.

C. To The Extent That *Wickard* Can Be Read To Justify Federal Regulation Of Respondents' Local Activities, It Should Be Overruled.

If *Wickard* is properly read (as we submit it is not) to permit direct federal regulation of respondents' purely local, personal possession of marijuana – the equivalent of Roscoe Filburn's bread-baking, considered in isolation – it should be overruled. If, as the Government suggests, *Wickard* establishes that any activity "occurring within a market is subject to Congress's commerce power even when the activity may itself not be commercial" (Pet. at 10), then it is unquestionably true that the aggregation principle knows "no stopping point," *Lopez*, 514 U.S. at 600 (Thomas, J., concurring), and should be abandoned as a rule of constitutional law.

The Government's rationale would sanction federal regulation not only of "simple drug possession" – and gun possession, *but see Lopez* – but of a whole host of other local activities, as well. As just one example, consider that this Court has recognized that there exists a commercial "market" for garbage. *See C&A Carbone, Inc. v. Clarkstowne*, 511 U.S. 383, 391 (1994); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 621-23 (1978). Accordingly, on the Government's reading of *Wickard*, Congress (or HHS, or HUD, or EPA) could commandeer the regulation of local litter. That cannot be the law. *See Lopez*, 514 U.S. at 585 (Thomas, J., concurring). The Government's theory of *Wickard* would give to Congress the very "plenary police power" that the Constitution "withhold[s]" from it, *id.* at 566 (majority opinion), and would thus "obliterate the distinction between what is national and what is local" and tend to "create a completely centralized government," *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

III. The Government's "Frustration Of Purpose" Argument Does Not Justify The CSA's Application To Purely Local Activity.

The Government devotes a substantial portion of its defense of the CSA's application here to the argument that its ability to police the interstate aspects of the drug trade will be undercut if it cannot also regulate purely local possession and personal use. *See* U.S. Br. 20-35. For one thing, the Government contends that Congress ought to be able to get at the local possession and use that, it says, "feeds" the larger illicit drug market. U.S. Br. 27. To a similar end, the Government argues that "given the fungible nature of drugs," it is "'not feasible to distinguish'" between drugs cultivated, possessed, and used locally from those moving in interstate commerce "'in terms of controls.'" U.S. Br. 29 (quoting 21 U.S.C. §801(5)); *see also id.* at 30 ("difficulties of proof"). Thus, the Government says (with emphasis), "Congress concluded that '*[f]ederal control of the intrastate incidents*

of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.'" U.S. Br. 23 (quoting 21 U.S.C. §801(6)); *accord id.* at 11 ("Congress has concluded that regulation of all intrastate drug activity '*is essential* to the effective control' of interstate drug trafficking." (Government's emphasis)).

There are several problems with the Government's frustration-of-purpose argument. First, the Government's argument assumes – wrongly, *see supra* at 17-18 – that *Wickard*'s aggregation principle applies here. There is no dispute that the respondents *in this case* cultivate, possess, and consume the marijuana at issue entirely within the State of California. Accordingly, there is no problem *in this case* of distinguishing intra- from interstate marijuana, nor is there any reason on the record here to think that the marijuana *in this case* is somehow "feed[ing]" the larger interstate drug market. *See, e.g.*, U.S. Br. 9 (quoting district court's preliminary injunction in this case as reaching only "intrastate, non-commercial cultivation, possession, and use" of marijuana "which is not used for distribution, sale, or exchange"). Assuming that the enforcement concerns the Government identifies exist, they exist on a macro level, not in this case specifically. And because the aggregation principle does not apply here (drug possession not being an "economic" activity), the "feed[ing]" and "fungib[ility]" premises underlying the CSA's application to intrastate activity melt away.

Second, the Government's frustration-of-purpose argument – that without authority over local cultivation and possession Congress cannot efficiently regulate interstate trafficking – is not (nor does it really even purport to be) a *constitutional* argument. At bottom, the Government's contention seems to be that a loss of control over local activity would undercut the "effectiveness of the comprehensive regulatory regime Congress established" and "interfere with Congress's objectives" (U.S. Br. 12-13), and that, accordingly, "the CSA comprehensively bans *all* manufacture, distribution, and possession of any

scheduled drug" (U.S. Br. 17). But this is not a run-of-the-mill statutory construction case in which invocations of congressional purpose or arguments about effective enforcement can carry the day. Rather, the question presented here is whether the regime that "Congress established" comports with the Constitution and whether the CSA *may* validly control "all" aspects – including purely local aspects – of marijuana cultivation, possession, and use.

On that score, this Court has emphasized in numerous contexts before that the "prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 691 (1977); *accord, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 218 (1986); *Craig v. Boren*, 429 U.S. 190, 198 (1976). In the context of criminal law enforcement specifically, there are, of course, all sorts of crime-fighting techniques – general searches, coerced confessions, and the like – that, despite their obvious effectiveness, are simply off-limits. Indeed, one need look no further than the line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and proceeding through *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 124 S. Ct. 2531 (2004) – and perhaps culminating in *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105 – to appreciate that not even the threat of something much more serious than administrative inefficiency can suffice to justify dispensing with constitutional protections. There is no reason why arguments from convenience or feasibility, deemed insufficient when dealing with individual rights, ought to hold sway here given that our federalist structure of government, like the Bill of Rights itself, "'was adopted by the Framers to ensure protection of our fundamental liberties.'" *Lopez*, 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Third, although the Government has asserted that "comprehensive regulation of ... local activity is essential to effectuate control of the interstate drug market" (U.S. Br. 24), and that the CSA's objectives "cannot be achieved" without control over intrastate conduct (Pet. at 14), it has offered no hard data to substantiate those assertions. In support of its contention that it needs to be able to reach purely local activity to effectuate the CSA's "central purposes" (U.S. Br. 17), the Government relies principally on rote recitations of congressional findings (U.S. Br. 11, 22-23, 29) and asserts that "[t]hose findings fully support Congress's conclusions" concerning the necessity of regulating local activity (U.S. Br. 23-24). The problem, respectfully, is that while the "findings" may support the "conclusions," the Government has offered nothing in the way of evidence to support the findings. While the Government offers some data in its brief (the accuracy of which we do not doubt for a moment) concerning the scope of the marijuana problem generally (U.S. Br. 18-20), nowhere does it provide any evidence – statistical, anecdotal, or otherwise – that federal drug policy cannot survive without preemptive regulatory authority over purely local activity. In place of analysis, the Government merely asserts that the risk is "obvious" (U.S. Br. 25) and "comports with common sense" (U.S. Br. 29). We respectfully submit that where the Federal Government is so clearly pushing the constitutional envelope – here, a full step beyond *Wickard*, *see supra* at 18-24 – it must, at the very least, make a more sustained showing than it has here.

Fourth – and the capper from the our perspective – the Government's arguments about the imperative of effective drug-control policy *completely ignore the ongoing efforts of state and local law enforcement.* For instance, in connection with its contention that local use and possession feed demand and thus swell the interstate market, the Government says that "[i]f *Congress* lacked the power to regulate" intrastate cultivation and possession, "the market effects on the demand and supply

of marijuana would likely be enormous," and, indeed, that "[t]he risk that both the supply and demand could dramatically increase were home-grown marijuana beyond the reach of *federal law* is obvious." U.S. Br. 25 (emphasis added). The Government later reiterates its position that "the unregulated intrastate manufacturing, possession, and distribution of a drug" would frustrate efforts to stem interstate trafficking, and that "[w]ere *Congress* to lack the power to regulate" local activity, persons could function essentially as "unregulated and unsupervised" drug manufacturers and pharmacies. U.S. Br. 32, 33-34.

Where do States, counties, and municipalities fit into the Government's theory of this case? Regrettably, the answer appears to be that they don't. The Government's assertion of federal power over local activity seems rather plainly to rest on the assumption that absent federal regulation, anarchy would reign at the local level. The Government's assumption of local law enforcement's irrelevance is (to say the least) unwarranted. As Alabama's own record of enforcement makes clear, *see supra* at 5-7, the States are ready, willing, and able to police and prosecute local drug crimes. *See also Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("[W]e presume that [state] law enforcement officers are ready and able to enforce" the law.). And the Government has done nothing in its brief to demonstrate (nor could it, we submit) that state and local enforcement efforts are so woefully inadequate – or a cooperative relationship with state and local governments so unduly burdensome – that a federal takeover is justified.

* * *

None of this is to suggest, of course, that the States don't want and need the Federal Government's help. The amici States certainly do – subject to constitutional limits. Fortunately, there are viable crime-fighting alternatives short of a full-blown federal takeover of local policing. The Federal Government, for instance, grants money to

state and local law-enforcement agencies – for which those agencies are grateful, we can attest – aimed at preventing and eradicating marijuana use. *See, e.g.*, Office of National Drug Control Policy, Drug Policy Information Clearinghouse: State of Alabama 2-4 (May 2004) ("ONDCP Report") (cataloguing Alabama programs receiving "[f]ederal [f]unding"). It is the Federal Government's prerogative, within limits, to attach conditions to the use of those funds and to direct expenditures toward what it perceives to be the most effective drug-control and prevention strategies. *See, e.g.*, *Sabri v. United States*, 124 S. Ct. 1941, 1947 (2004); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). Furthermore, so long as it does not cross the line into unconstitutional "commandeering," *see Printz v. United States*, 521 U.S. 898 (1997), the Federal Government may – and we submit should – partner with state and local law enforcement to achieve the comprehensive regulation of the drug trade that all agree is needed. *See, e.g.*, ONDCP Report, *supra*, at 7 ("cooperative program between DEA and its state and local law enforcement counterparts"); Birmingham PD Report, *supra* at 5 ("interagency cooperation" with federal authorities). What the Federal Government may *not* do is displace the States from their traditional role as the enforcers of local criminal law and assume the States' historic police power to provide for the health, safety, welfare, and morals of their citizens.

CONCLUSION

This is an extraordinary case. The amici States find themselves, essentially, in complete agreement with the Federal Government as a matter of drug-control policy, but in complete disagreement as a matter of constitutional principle. Bound through their elected officials to privilege the latter over the former, *see, e.g.*, Ala. Const. Art. XVI, §279 ("[o]ath of office"), the amici States respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

State Marijuana-Possession Prohibitions

State	Statute
Alabama	Ala. Code §§ 13A-12-213, 13A-12-214
Alaska	Alaska Stat. § 11.71.060(a) (held unconstitutional by *Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003))
Arizona	Ariz. Rev. Stat. § 13-3405
Arkansas	Ark. Code Ann. § 5-64-401
California	Cal. Health & Safety Code § 11357
Colorado	Colo. Rev. Stat. Ann. § 18-18-405
Connecticut	Conn. Gen. Stat. § 21a-279
Delaware	Del. Code Ann. tit. 16, § 4754(a)
District of Columbia	D.C. Code Ann. § 48-904.01
Florida	Fla. Stat. Ann. § 893.13
Georgia	Ga. Code Ann. § 16-13-30
Hawaii	Haw. Rev. Stat. § 712-1249
Idaho	Idaho Code § 37-2732
Illinois	720 Ill. Comp. Stat. 550/4
Indiana	Ind. Code § 35-48-4-11
Iowa	Iowa Code Ann. § 124.401
Kansas	Kan. Stat. Ann. § 65-4162(a)(3)
Kentucky	Ky. Rev. Stat. Ann. § 218A.500(2)
Louisiana	La. Rev. Stat. Ann. § 40:966(C)
Maine	Me. Rev. Stat. Ann. tit. 22 § 2383

State	Statute
Maryland	Md. Code Ann., Crim. Law § 5-601
Massachusetts	Mass. Gen. Laws Ann. ch. 94c, § 34
Michigan	Mich. Comp. Laws § 333.7403(2)(d)
Minnesota	Minn. Stat. Ann. § 152.025
Mississippi	Miss. Code Ann. § 41-29-139(c)
Missouri	Mo. Ann. Stat. § 195.223
Montana	Mont. Code Ann. § 45-9-102(2)
Nebraska	Neb. Rev. Stat. § 28-416
Nevada	Nev. Rev. Stat. 453.336
New Hampshire	N.H. Rev. Stat. Ann. § 318-B:2
New Jersey	N.J. Stat. Ann. § 2c:35-10a(3)
New Mexico	N.M. Stat. Ann. § 30-31-23
New York	New York Penal Law § 221.05
North Carolina	N.C. Gen. Stat. § 90-95(a)(3)
North Dakota	N.D. Cent. Code § 19-03.1-23(6)
Ohio	Ohio Rev. Code Ann. § 2925.11
Oklahoma	Okla. Stat. Ann. tit. 63 § 2-402
Oregon	Or. Rev. Stat. § 475.992(4)
Pennsylvania	Pa. Stat. Ann. tit. 35 § 780-113
Rhode Island	R.I. Gen. Laws § 21-28-4.01
South Carolina	S.C. Code Ann. § 44-53-370
South Dakota	S.D. Codified Laws § 22-42-6
Tennessee	Tenn. Code Ann. § 39-17-417

State	Statute
Texas	Tex. Health & Safety Code Ann. § 481.115
Utah	Utah Code Ann. § 58-37-8
Vermont	Vt. Stat. Ann. tit. 18 § 4230(a)(1)
Virginia	Va. Code Ann. § 182-250.1
Washington	Wash. Rev. Code Ann. § 69.50.4013
West Virginia	W. Va. Code § 60A-4-401
Wisconsin	Wis. Stat. Ann. § 961.41(3g)(e)
Wyoming	Wyo. Stat. Ann. § 35-7-1031